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Hamilton Square 600 14th Street NW Suite 750 Washington, DC 20005  
W > www.covad.com

T > 202.220.0400  
F > 202.220.0401

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

EX PARTE

June 23, 2000

Ms. Magalie Roman Salas  
Secretary, Federal Communication Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: Ex Parte Presentation of Covad Communications Company in CC  
Docket No. 00-65, *Application by SBC Communications Inc., et. al. For Provision of In-Region, InterLATA Services in Texas*

Dear Ms. Salas,

Last year, the Texas Commission found that SWBT had engaged in several actual instances of discriminatory conduct in its relationship with CLECs—violations that ranged from improper communication of customer and collocation information to actual instances of misconduct. As a result, the Texas Commission in the DSL Arbitration Award ordered SWBT to put in place several “firewalls” (including the separation of wholesale and retail employees) that would remedy this conduct.

Earlier this week, in response to a Covad motion, the Texas Arbitration Panel found that SWBT’s firewall plan did not meet the standards of the DSL Arbitration Award and ordered SWBT to change the plan once again.<sup>1</sup> This action makes it abundantly clear that SWBT’s compliance with the DSL Arbitration Award remains “a work in progress” and that interLATA authority should be withheld until SWBT comes to terms with *all* relevant legal requirements.

In its Comments and Reply in this proceeding, Covad has stated that SWBT has failed to implement those firewalls ordered by the Texas Commission.<sup>2</sup> This issue is not new—Covad raised the same objection in the “first” Texas 271 application this year (CC Docket No. 00-4). Indeed, SWBT has spent most of this year trying to avoid implementation of the simple firewall rules ordered by the Texas Commission. SWBT

<sup>1</sup> *Implementation of Docket Nos. 20226 and 20272, Order No. 13* (Tex. P.U.C. June 23, 2000) (attached).

<sup>2</sup> See Covad Comments, CC Docket No. 00-65 at 16-17; Covad Reply, CC Docket No. 00-65, at 9-10.

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originally filed a “plan”<sup>3</sup> on January 14, 2000, after SWBT had filed its original FCC application to the FCC. When Covad and other CLECs called into question SWBT’s non-compliance with this portion of the DSL Arbitration Award, SWBT re-filed its 271 application on April 5, and supplemented its plan on April 14. On April 24, 2000 (prior to the Texas Commission’s comments on SWBT’s application) the Arbitration Panel modified SWBT’s plan and required SWBT to file yet another plan on May 1. This “modified plan” was approved by the Arbitration Panel on May 8, 2000.

As described in Covad’s Reply Comments, Covad filed a motion for reconsideration of the Arbitration Panel’s decision on May 12, 2000. Along with other issues, Covad argued that the modified plan was fundamentally flawed because it did not incorporate the very clear directive from the DSL Arbitration Award that SWBT may no longer assign employees to both wholesale and retail responsibilities.<sup>4</sup> SWBT replied that the creation of its advanced services affiliate (ASI) was sufficient to meet these requirements.

The attached decision *emphatically* states that SWBT’s separate affiliate “does not fully satisfy the concerns in the [DSL Arbitration] Award.”<sup>5</sup> In addition to ordering that SWBT to separate completely wholesale and retail responsibilities, the Arbitration Panel also agreed with Covad’s objections relating to the sharing of competitor information.<sup>6</sup>

In addition, in the ongoing DSL collaborative processes in Texas, it was recently revealed that SWBT was using an unapproved internal technical publication (TP 76860) in its xDSL loop provisioning activities—despite the requirement of the DSL Arbitration Award that SWBT only use technical publications that have been approved by the Texas Commission.<sup>7</sup> Order No. 13 lists no fewer than *twenty-one* requests for further information from SWBT on its use of TP 76860 and related engineering standards. The

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<sup>3</sup> SWBT’s January 14, 2000 filing was in actuality no more than a “draft” letter that it proposed to send to its employees that reiterated *existing* corporate policies. Clearly, SWBT’s existing policies were not sufficient to prevent the actual actions uncovered in the DSL Arbitration.

<sup>4</sup> See Covad Reply, Attachment 4 (Covad May 12 Motion). The DSL Arbitration Award clearly states that “SWBT should not be allowed to assign employees to both wholesale and retail responsibilities...” DSL Arbitration Award at 61. The Arbitration Panel’s decision today stated that this decision was based on the Panel’s finding that “it appeared that members of SWBT’s retail teams were accessing databases that contained information requested by CLECs and SWBT’s personnel were assigned to both retail and wholesale core teams.” See Order No. 13 at 3 (attached).

<sup>5</sup> *Id.* at 2.

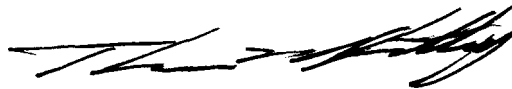
<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> DSL Arbitration Award at 39 (“SWBT shall not impose its own standards for provisioning xDSL services via its own Technical Publications”). The DSL Arbitration Award cites ¶ 63 of the *Second Advanced Wireline Services Order*, FCC 98-48, CC Docket No. 98-147 (rel. Mar. 31, 1999). The Arbitration Panel clearly ruled that “SWBT’s Technical Publications must be approved by the [Texas] Commission prior to use.”

fact that the apparent misuse of unapproved Technical Standards has still not been definitively resolved clearly shows that SWBT's 271 application is premature.

In addition to resolution of the technical publication issue, the Arbitration Panel ordered SWBT to file yet another "modified" firewall plan by July 7, 2000. This date is, ironically, *after* the FCC's deadline for deciding on the pending application. Given the fact that SWBT is clearly not in compliance with the DSL Arbitration Award, Covad cannot see how the Commission can legitimately grant the pending application.

Sincerely,



Thomas M. Koutsky  
Vice President – Regulatory Affairs  
Covad Communications Company  
600 14<sup>th</sup> Street, N.W., Suite 750  
Washington, DC 20005  
Tel: 202-220-0407

cc: Commissioner Legal Advisors  
Katherine Brown, Chief of Staff  
Larry Strickling, Chief, Common Carrier Bureau  
Jessica Rosenworcel, FCC  
Jake Jennings, FCC  
ITS

## DOCKET NO. 22165

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IMPLEMENTATION OF DOCKET  
NUMBERS 20226 AND 20272§  
§PUBLIC UTILITY COMMISSION  
OF TEXAS

## ORDER NO. 13

**ORDER GRANTING COVAD's MOTION TO RECONSIDER ORDER NO. 10;  
REQUIRING FURTHER MODIFICATION TO SWBT's MODIFIED PLAN TO  
ENSURE COMPETITIVE NEUTRALITY; REQUESTING COMMENT;  
REQUESTING ADDITIONAL INFORMATION REGARDING TP 76860 TX;  
AND NOTICE OF WORKSHOP**

**I. GRANTING COVAD's MOTION**

The Arbitration Award (Award)<sup>1</sup> ordered SWBT to create "firewalls" to separate SWBT's retail and wholesale digital subscriber line organizations.<sup>2</sup> The purpose of the "firewalls" was to restrict the flow of competitively beneficial information. SWBT filed its plan to ensure the competitive neutrality and nondiscrimination in the use of competitively relevant information on January 14, 2000.<sup>3</sup> SWBT filed additional information relating to the plan, as requested by the Arbitrators, on April 14, 2000. On April 24, 2000, the Arbitrators issued Order No. 7, which modified SWBT's plan. As required by Order No. 7, SWBT filed its "modified plan" on May 1, 2000. On May 8, 2000, with the issuance of Order No. 10, the Arbitrators approved SWBT's "modified plan" and ordered that it be distributed to all relevant employees immediately. Order No. 10 also required SWBT to file an affidavit affirming the distribution of the "modified plan" and to file revised SBC Competition Guidelines. On May 16, 2000, SWBT filed an

<sup>1</sup> See *Petition of Rhythms Link, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Docket No. 20226, Arbitration Award, (Nov. 30, 1999); and *Petition of DIECA Communications, Inc., d/b/a COVAD Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company*, Docket No. 20272, Arbitration Award, (Nov. 30, 1999).

<sup>2</sup> DPL Issue No. 16, pg. 70.

<sup>3</sup> SWBT's Notice of Plan to Ensure Competitive Neutrality and Nondiscrimination in the Use of Competitively Relevant Information, January 14, 2000.

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affidavit affirming the distribution of the "modified plan." On June 2, 2000, SWBT requested a week extension in the deadline to file the revised SBC Competition Guidelines. The Arbitrators granted SWBT's request and the revised SBC Competition Guidelines were filed on June 7, 2000.

On May 12, 2000, Covad filed a motion requesting the Arbitrators to reconsider Order No. 10. Covad argued that the "modified plan" did not prevent SWBT from assigning employees to both wholesale and retail responsibilities. Covad also explained that the term "Competitor Information" referenced in SWBT's "modified plan" did not include CLEC customer information. Therefore, Covad explained, leaving open the possibility that SWBT could use CLEC information to its advantage. Further, Covad was concerned that the "modified plan" did not include a detailed description of the methods that SWBT intends to employ to ensure the confidentiality of CLECs' competitive sensitive information.

On May 23, 2000, SWBT filed a late response to Covad's motion. SWBT argued that Covad took the language in the Award out of context. SWBT asserted that the creation of Advanced Solutions, Inc. (ASI) is the solution that the Arbitrators wanted when dealing with concerns regarding wholesale and retail responsibilities.

The Arbitrators grant Covad's motion to reconsider Order No. 10. The creation of ASI, as well as the direction to SWBT employees that ASI and SWBT retail divisions are to be treated in the same manner as CLECs, is necessary to ensure competitive neutrality. However, it does not fully satisfy the concerns in the Award. It was the Arbitrators' desire that appropriate relationships within and between SWBT and ASI be clarified through the "modified plan" that was issued to SWBT's management employees and the revised SBC Competition Guidelines. While the Arbitrators find that these two documents help to ensure competitive neutrality within SBC, certain concerns remain unresolved, and the documents must be further modified, as outlined in Section II of this Order.

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## II. MODIFICATIONS TO SWBT'S PLAN

In order to fulfill SWBT's obligations as set forth in the Award, the Arbitrators order SWBT to incorporate the following modifications into its "modified plan." The Arbitrators order SWBT to file a "further modified plan," or a supplement to the "modified plan" distributed on May 15, 2000, no later than 3:00 pm. Friday, July 7, 2000, for approval.

1. The Arbitrators were originally concerned with the flow of information between SWBT's retail and wholesale groups. As clarified in the Award, it appeared that members of SWBT's retail teams were accessing databases that contained information requested by CLECs and SWBT's personnel were assigned to both retail and wholesale core teams. The Award expressly states that "SWBT should not be allowed to assign employees to both wholesale and retail responsibilities..."<sup>4</sup> Moreover, the SBC/Ameritech Merger Conditions require SBC and ASI to abide by the Federal Communications Commission's (FCC) affiliate rules under § 272(b), (c), (e) and (g) of the federal Telecommunications Act (FTA).<sup>5</sup> Section 272(b)(3) requires that SBC and ASI "have separate officers, directors, and employees" while operating at arms length.

Therefore, the Arbitrators order SWBT to explicitly state the restriction of assigning employees to both wholesale and retail responsibilities in its "further modified plan."

2. The Arbitrators concur with Covad's concern that the term "Competitor Information" used in the "modified plan" does not include CLEC customer

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<sup>4</sup> Award at 61.

<sup>5</sup> Merger Conditions, pg. 2-3; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (FTA).

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information. In the Award, the Arbitrators expressed concerns with the accessibility of information that in any way may advantage SWBT's retail advanced services operations over those of its competitors. The Award went so far as to explicitly ban SWBT employees from gaining access to information that in any way may advantage its retail advanced services operations over those of its competitors.<sup>6</sup> The potential for misuse of competitively sensitive information was one of the cornerstones of the Arbitrators' requirement that SWBT provide further assurance that competitively beneficial information is not being passed from SWBT's network provisioning operations to its retail service operations.<sup>7</sup> Therefore, the Arbitrators order SWBT to explicitly state that the term "Competitor Information" used in the "modified plan" includes any information received from a CLEC, including CLEC customer information, that if provided to SWBT's retail operations or affiliates, would place SWBT's retail operations or affiliates at a competitive advantage.

### III. MODIFICATIONS TO SBC'S COMPETITION GUIDELINES

In order to fulfill SWBT's obligations as set forth in the Award, the Arbitrators order SBC to further revise its Competition Guidelines. SWBT shall file a modified version of the SBC Competition Guideline no later than 3:00 p.m. Friday, July 7, 2000. The modified SBC Competition Guidelines shall incorporate the following modifications:

1. The last sentence of Section 3.3.4 should be revised to read: "... (b) causes the improper sharing of competitively sensitive business information including, but not limited to, pricing, costs, operating plans, and customer information."
2. Section 3.3.11 should be modified in order to clarify that ASI is included in the definition of "competitor customers." Therefore, SWBT and ASI may not

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<sup>6</sup> Award at 61.

<sup>7</sup> Award at 70.

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exchange competitively sensitive information except as necessary to accomplish legitimate business transactions between the two companies.

3. Section 3.3.15 should be revised to explicitly state the restriction of assigning employees to both wholesale and retail responsibilities, as outlined in Section II(1) of this Order.
4. Section 3.7.7 should be revised to state: "For example, network and other personnel involved in product development processes for both either retail and/or wholesale offerings may require access to information that will enable the Company to develop...."

#### IV. COMMENTS REGARDING MODIFIED FILINGS

Covad and Rhythm's Links Communications (Rhythms) may file comments regarding SWBT's further modified filings no later than 3:00 p.m. Wednesday, July 12, 2000.

#### V. REQUESTING ADDITIONAL INFORMATION REGARDING TP 76860 TX

In order to consider the approval of Technical Publication (TP) 76860 TX, the Arbitrators require SWBT to file the following additional information no later than 3:00 p.m. Tuesday, June 27, 2000. The Arbitrators also schedule a workshop to discuss the TP in Section VI of this Order.

1. Has TP 76860 TX been approved by the FCC?
2. How long, and to what extent, has SWBT utilized TP 76860 TX?
3. Please provide copies of Issues 1-7 of TP 76860 TX.
4. Please provide the revision history for Issues 1-3 of TP 76860 TX.
5. Please provide effective dates for Issues 1-8 of TP 76860 TX.



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6. Describe the CLEC involvement in the revisions made to Issues 1-8 of TP 76860 TX.
7. Please provide a copy of Bellcore TR-NWT-000393.
8. Please provide a copy of the current issue of Bellcore TR-NWT-000397 and Issue 2, January 1993.
9. Please provide a copy of Bellcore TR-TSY-000398.
10. Please provide a copy of the current issue of Bellcore TR-NWT-000054, and Issue 2, February 1993.
11. Please provide a copy of the current issue of Bellcore TR-INS-000342, and Issue 1, February 1991.
12. Please provide a copy of ANSI T1.601.
13. Please provide a copy of ANSI T1.403.
14. Please provide a copy of ANSI T1.102.
15. Please provide a copy of ANSI T1.107.
16. Please provide a copy of Telcordia GR-253-CORE.
17. Please provide a copy of Telcordia GR-499-CORE.
18. Please provide copies of all issues of TP 76625, including revision history and effective dates.
19. Has TP 76625 TX been approved by the FCC or this Commission?
20. How long, and to what extent, has SWBT utilized TP 76625?
21. Describe the CLEC involvement in the revisions made to all issues of TP 76625.

#### VI. NOTICE OF WORKSHOP

The Commission shall convene a workshop, jointly with the xDSL working group (Project No. 20400), at 9:30 a.m. on Tuesday, July 18, 2000, to discuss SWBT TP 76860 TX. All interested parties may prefile comments regarding the TP no later than 3:00 p.m. on Monday, July 10, 2000.

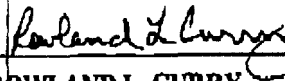
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SIGNED AT AUSTIN, TEXAS the 21<sup>st</sup> day of June 2000.

PUBLIC UTILITY COMMISSION OF TEXAS



ROWLAND L. CURRY

ARBITRATOR



MELANIE M. MALONE

ARBITRATOR

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